Supreme Court, U.S.
FILED
DEC 30 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-814

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

WAYNE DOUGLAS SMITH,

Petitioner,

v.

THE STATE OF WASHINGTON,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

GARY P. BURLESON
PROSECUTING ATTORNEY

MICHAEL E. CLIFT
DEPUTY PROSECUTING ATTORNEY
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Shelton, Washington 98584
(206)427-9670

ATTORNEY FOR RESPONDENT:
MICHAEL E. CLIFT

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STATEMENT OF THE CASE

On January 27, 1984, The Honorable Hewitt A. Henry, Judge, approved a search warrant for the petitioner's property located at 40 Woodlane, Shelton, Washington. (Appendix A) The warrant was executed the same day. The following items were seized at the petitioner's residence pursuant to the warrant:

274 started marijuana plants, three to eight inches tall;

88 growing marijuana plants, four feet tall and over;

various small containers of marijuana seeds;

10 halogen light bulbs, 1000 watts each;

4 halide reflectors;

3 halide lamp balasts;

2 twelve-foot-long florescent lamp fixtures with twelve-foot bulbs;

various lights, timers, and switches;

large electric fan;

Ohaus triple beam scale;

Ohaus balance scale;

assorted baggies;

mirror and straw;

various books on cultivation of marijuana and hallucinogenic mushrooms;

photos of marijuana plants in various locations other than 40 Wood Lane;

correspondence to the defendant addressed to him at 40 Wood Lane, and opened;

two recorded tapes taken from the answering machine at 40 Wood Lane;

numerous photos (these taken by police) of the evidence, displaying the layout and scope of the growing operation at 40 Wood Lane.

(APPENDIX B)

The warrant was based upon information provided by a confidential reliable informant.

The informant, later identified as James Morris advised Detective Morrison that he had grown marijuana with the petitioner in the past and that the petitioner was currently growing

marijuana at the 40 Wood Lane property and at the river road property located at Rt.5 Box 575-A, Shelton, Washington. A search pursuant to a warrant at the river road property revealed that a marijuana growing operation had in fact been on that property. The remaining physical evidence, including a strong odor of marijuana and two leaves combined with the neighbors reports that the defendant left the premises with a heavily loaded truck earlier in the day corroberated the information provided by Mr. Morris.

Mr. Morris, on his own initiative, went to the 40 Wood Lane property and observed the marijuana plants on January 26, 1984. He had also observed the plants during December 1983.

Mr. Morris had the petitioner's permission to be on the property. Mr. Morris had installed a skylight for the defendant in late August or September 1983 and felt he could inspect it

pursuant to a verbal warranty. Futhermore, Mr. Morris had a key to the 40 Wood Lane residence during January 25-27, 1984 and had used the key to shower and clean up there. Mr. Morris had permission to use the key. (Findings of Fact 66)

Detectives Morrison and Peterson specifically told Mr. Morris on more than one occassion that he could not go on the property at 40 Wood Lane without a legitimate reason, and that he could not go as a trespasser. (Findings of Fact 64)

Procedural Facts

The trial court entered numerous Findings of Fact at the suppression hearing. (Petition For Writ, Appendix C). The court found that the information provided by Mr. Morris was "...truthful,and accurate, was corroborated and did not omit any

material Fact." (Finding of Fact 78).

The court further found that when Mr. Morris went to 40 Wood Lane, he did so on his own to do a repair and was not acting as an agent or under the direction of Detective Morrison. (Finding of Fact 79).

The trial court upheld the search warrant and subsequent search. The Washington State Supreme Court affirmed the judgment at State v. Smith, 110 Wn.2d 658,_____P.2d_____(1988).

REASONS FOR DENYING THE WRIT

I. CERTIORARI SHOULD BE DENIED BECAUSE THERE ARE NO SPECIAL AND IMPORTANT REASONS TO GRANT IT.

1. A Writ of Certiorari will be granted only when there are special and important reasons therefore. Rule 17.1 Furthermore, the Supreme Court will not grant a Writ of Certiorari merely to review evidence or inferences drawn from it. General Talking Pictures Corp. v.

Western Electric Co., (1938) 304 U.S. 175, 82 L.Ed. 1273, 58 S.Ct. 849, adhered to 305 U.S. 124, 83 L.Ed. 81, 59 S.Ct. 116, reh.den. 305 U.S. 675, 83 L.Ed. 437, 59 S.Ct. 355.

The informant, Michael Morris was found to be acting strictly on his own when he entered the petitioner's property at 40 Wood Lane and not at the direction of or as an agent of law enforcement. Mr. Morris had ongoing permission of the petitioner to enter the premises and in fact had been given a key to enter the residence.

The petitioner asks the Court to Find an agency relationship where the trial court has made a Finding that none exists in fact or in law.

Furthermore, the petitioner characterises Mr. Morris' actions as a trespass, however, no such finding was made. Interesting legal arguments were

made and decided in the context of "what if the informant acting as a private individual acted illegally?" Yet, there was no finding that Mr. Morris acted illegally as he had permission from the petitioner to use the premises and even had a key to the residence. This question is not of sufficient magnitude, nor is it based upon facts which warrant review by this Court.

The state court held

> In order to prove that a private individual was acting as a government agent, "[i]t must be shown that the State in some way `instigated, encouraged, counseled, directed, or controlled' the conduct of the private person." Wolken at 830, ... Agee stated that "mere knowledge by the government that a private citizen might conduct an illegal private search without the government taking any deterent action [is] insufficient to turn the private search into a governmental one.

Agee, at 714 citing Lusting v.

United States, 338 U.S. 74, 79, 93 L.Ed. 1819, 69 S.Ct. 1372 (1948)"

State v. Smith, 110 Wn.2d 658, 666 (1988)

The Washington State Supreme Court's decision is not in conflict with any decision of any federal court of appeals and the law has been settled in this area.

2. The judgment rests on adequate federal and state grounds.

CONCLUSION

The petition should be denied.

Respectfully submitted,

GARY P. BURLESON
PROSECUTING ATTORNEY

MICHAEL E. CLIFT
Deputy Prosecuting
Attorney for the
Respondent.

Shelton, Washington
December 23, 1988

APPENDIX A

WPF CR-02.0400 (1992)

RECEIVED
AND FILED
JAN 27 1984
ELAINE PROVINCE
CLERK OF THE SUPERIOR COURT
MASON COUNTY, WASH
By

MASON COUNTY COURT

BEFORE _____, JUDGE

STATE OF WASHINGTON }
COUNTY OF } ss

AFFIDAVIT FOR SEARCH WARRANT
(CASE NO. SCSA84-3)

The undersigned on oath states:

1. I am Donald L. Morrison, WSP
(name) (Title/Agency)

2. That affiant states:

[X] Evidence of a crime (describe):
See Attached affidavit

JUL 5 1985

[X] Contraband, the fruits of a crime, [illegible]ings otherwise criminally possessed (consisting of):
See attached affidavit

[ ] Weapons or other things by means of which a crime has been committed or reasonably appears about to be committed (describe):

are concealed in Mason County, Washington in, on, or about:

[X] Certain premises (describe):
Residential property located at 40 Woodlane,
Shelton Wa.

[ ] Vehicles (describe):

[ ] Person(s) (description(s)):

3. That affiant's belief is based upon the following facts and circumstances:

See attached

D. L. Wilkinson
Affiant

D. L. WILKINSON
Type or Print Name

Sworn and subscribed on:
Date: Jan. 27, 1984

Notary Public for Washington
Residing at Shoreview

Approved by:

Deputy Prosecuting Attorney

IF ANY ADDITIONAL FACTS ARE RELIED UPON, THEY MUST BE SET FORTH AND SWORN TO ABOVE.

RECEIVED
AND FILED
JAN 27 1984
ELAINE PROVINCE
CLERK OF THE SUPERIOR COURT
MASON COUNTY, WASH.

AFFIDAVIT OF DET. DONALD MORRISON

STATE OF WASHINGTON)
) ss. 84SCSW043
COUNTY OF MASON)

DET. DONALD L. MORRISON, being first duly sworn upon oath, deposes and states:

THAT your affiant is a duly commissioned detective with the Washington State Patrol assigned to the Narcotics Division.

THAT you affiant has probable cause to believe that evidence of a felony, possession of a controlled substance, Marijuana, over 40 grams, is located upon the following described real property:

A 2 story Log Cabin, two sky lights, a new wood deck covering that portion of the residence that faces Wood Lane and East Hill Crest. The dwelling is located on a corner lot, at Wood Lane and East Hill Crest.

Your affiants probable cause is based on the following:

That a confidential reliable informant (I-NS 84-012) contacted your affiant and furnished the following information to your affiant, reference illegal indoor Marijuana cultivation.

1. That the residence, 40 Wood Lane, there is Marijuana plants under cultivation. Confidential reliable informant stated that he/she had observed the marijuana plants in December 1983 and was on the property on January 26, 1984 and informed your affiant that the marijuana plants, and Hal-lide lights are still present and that the plants are still under cultivation. Confidential reliable informant further stated that there are additional lights in operation upstairs at this time. Confidential reliable informant advised your affiant that the residence is owned by Lind Buddrius and rented by Wayne D. Smith. Smith lives at the residence along with a male subject known as Mike.

Confidential reliable informant stated that he/she has known Smith to grow Marijuana steady for the past year. Confidential reliable informant at one time was involved with Smith in growing Marijuana.

2. Confidential reliable informant has in the past furnished to the Shelton Police Department at which he was paid for the information. No cases have been opened at this time.

3. Confidential reliable informant at the present is working with the Washington State Patrols Narcotics Section introducing agents into known drug traffickers and furnishing information on other Marijuana cultivation.

Confidential reliable informant has in the past week introduced your affiant to a cocaine dealer at which confidential reliable informant and your affiant purchased one-quarter ounce of cocaine and negotiated for the purchase of up to an ounce of cocaine from the same person.

Information received from other sources corroborates all of the information confidential reliable informant has furnished to your affiant.

4. Wayne D. Smith - 10-23-51 - lives and rents the house at 40 Wood Lane in the Agate area, Shelton, Washington. Smith owns property at Rt. 5 Box 575A, Shelton, Washington and in 1982 Smith purchased property at 5644 Steamboat Island Road, Olympia, Washington. Confidential reliable informant states that the property in Olympia was purchased to grow Marijuana.

5. On January 25, 1984 your affiant served a search warrant at Rt. 5 Box 575A, Shelton, Washington. This property is owned also by Wayne D. Smith. The search warrant was for Illegal Cultivation of Marijuana. All that was located was a growing room, strong-odor of Marijuana, condensation on the insulated walls and two (2) small leaves of Marijuana on the ground outside of the shed. Your affiant at this time was advised by neighbors that Wayne D. Smith, driving his yellow Datsun Pick-up, had departed the residence approximately fifteen (15) minutes prior to our arrival at approximately 4:30 p.m. Your affiant was advised that the Pick-up was heavily loaded and almost ran the neighbor off of the road exiting the area.

Your affiant at approximately 6:15 p.m., January 25, 1984, located Wayne Smith's yellow Datsun pick-up at 40 Wood Lane, Shelton, Washington. The pick-up appeared to be approximately one-quarter full and was being unloaded by a male subject. Your affiant at that time was unable to identify the items being unloaded.

Further affiant sayeth naught.

Donald Morrison
DET. DONALD MORRISON

SUBSCRIBED AND SWORN to before me this 27th day of January, 1984.

Diana K. Olson
NOTARY PUBLIC in and for the State of Washington, residing at Shelton

WPF CR-02.0410 (8/

RECEIVED AND FILED
JAN 27 1984
ELAINE PROVOL
CLERK OF THE SUPERIOR C.
MASON COUNTY, WASH.
By _____

MASON COUNTY _____ COURT

BEFORE _____, JUDGE

SEARCH WARRANT
(CASE NO. SC5a84-3)

TO ANY PEACE OFFICER IN THE STATE OF WASHINGTON:

1. Upon the sworn affidavit of Donald J. Morrison made before me, it appears that there is probable cause to believe that:

[ ] Evidence of a crime, or

[X] Contraband, the fruits of crime, or things otherwise criminally possessed, or

[ ] Weapons or other things by means of which a crime has been committed or reasonably appears about to be committed

are under the control or in the possession of some person(s) and are concealed in or on certain premises, vehicles or persons within Mason County, Washington hereinafter described.

2. YOU ARE COMMANDED to:

[X] Search said premises, vehicles or persons specifically described as follows:

40 Woodlane, Shelton Wa.

[X] Seize the following property specifically described as follows: Any and all suspected marijuana and/or any equipment or paraphinalia used to cultivate or process marijuana together with evidence of ownership.

3. Safely keep the property seized.

4. Return this warrant to the undersigned judge within 5 days following issuance. The return must include an inventory of all property seized.

A copy of the warrant and a receipt for the property taken shall be given to the person from whom or from whose premises property is taken. If no person is found in possession a copy and receipt shall be conspicuously posted at the place where the property is found.

Dated: 1/27/89

Judge

As authorized by the above judge pursuant to CrR 2.3 (telephone search warrant).

Name

Type or Print Name

Title

The document to which this certificate is attached is a full, true and correct copy of the original on file and of record in my office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court this 27th day of Jan 19 89

Elaine Province

County Clerk and Clerk of the Superior Court of the State of Washington, in and for the County of Mason.

By Deputy

APPENDIX B

WPF CR-02.0420 ('82)

RECEIVED
AND FILED
JAN 30 1984
ELAINE PROVINCE
CLERK OF THE SUPERIOR COURT
MASON COUNTY, WASH.
By _____

Mason County ~~Mason~~ COUNTY Superior COURT

BEFORE HENRY, Superior Court JUDGE

INVENTORY AND RETURN OF SEARCH WARRANT
(CASE NO.)

#1 1. I received a search warrant for the premises, vehicle or person specifically described as follows:
SMITH, WAYNE D. 40 WOOD LN. SHELTON

#2 2. I made a diligent search of the above-described premises, vehicle or person and found and seized the items listed as follows:
SEE REVERSE SIDE

#3 3. Name(s) of person(s) found in possession of property:
NONE

#4 4. The inventory was made in the presence of:

[ ] The person(s) named in (3) from whose possession the property was taken.

[X] DON MORRISON WSP (At least one person other than the undersigned)

#5 5. Name of person served with a copy of warrant and given a receipt for the property taken or description of place where copies posted:
KITCHEN TABLE

#6 6. Place where property is now stored:
SHELTON POLICE DEPT

Dated: 1-27-84

Witnessed by:
John Sussman
Signature

Type or Print Name

D L Morrison WSP
Signature of Peace Officer

D.L. Morrison
Type or Print Name

Detective
Title

INVENTORY AND RETURN OF SEARCH WARRANT (CrR 2.3(d)) INRSW

INVENTORY OF WARRANT RETURN.

3.

#1 132 MARIJUANA STARTED PLANTS 3" TO 8" HIGH
#2 LARGE GARBAGE BAG CONTAINING G.V.M.
#3 EIGHT 1000 WATT HALIGEN BULBS
#4 OHAUS TRIPLE BEAM SCALE WITH WEIGHTS AND (4) TIMERS
#5 HALIDE BALLAST
#6. BALLAST AND TIMER
#7. HID LAMP BALLAST
#8. HID LAMP BALLAST
#9. DAYTON TIMER SWITCH
#10. ONE BEN LEATHER BAG CONTAINING INDICIA, RECORDS, PHOTOS AND PERSONAL PHONE BOOK.
#11. (2) 1000 WATT HALIDE BULBS
#12 (2) 12FT FLORICENT LIGHTS WITH BULBS
#13 ONE GROCERY BAG OF G.V.M
#14 (1) 24 HOUR 110 VOLT TIMER
#15 VARIOUS SMALL CONTAINERS OF MARIJUANA SEEDS
#16 ONE GROCERY BAG OF (2) PLASTIC BAG OF GUM
#17 ASSO BAGGIES, BOX OF PARAPHILIA, PERSONAL USE DISH, MIRROR AND STRAW. BAGGIE WITH G.V.M.
#18. OLDER OHAUS BALANCE SCALE
#19. $2052.00 IN CASH
#20. S&W 9mm MODEL #59 SER# A668285
#21. VARIOUS BOOKS ON MARIJUANA GROWING.
#22. GROWING MARIJUANA 50 PLANTS 4FT + HIGH
#23. GROWING MARIJUANA 38 PLANTS 4 TO 5 FT HIGH
#24. 4 HALIDE REFLECTORS
#25. THREE ELECTRIC BULB HOLDERS
#26. TWO RECORDED TAPES
#27. 142 STARTER PLANTS
#28. ASSORTED RECORDS
#29. HALIDE LIGHTS
#30. FAN (DAYTON)

G. Matt Heil
STRETTON DRUG ENFORCEMENT